Jorge Calderón Gamboa

Independent Expert of the UN Program - Harmony with Nature, Visiting Professor at the UN-mandated University for Peace, Former Legal Secretary of the IACtHR

Commentary on Strasbourg Principles nos. 9 and 10: right to a healthy environment

Principles 9 and 10 of the Strasbourg Principles reflect the dimensions and perspectives that have been evolving in the world regarding the right to a healthy environment, such as the traditionally anthropocentric and emerging Eco systemic views. They also encompass the scope of the right with substantive and procedural elements.

In the Inter-American System for the Protection of Human Rights, as a consequence of the new jurisprudence regarding Economic, Social, Cultural and Environmental Rights (ESCER), in December 2017, through its Advisory Opinion No 23 on the Environment and Human Rights (AO 23/17), the Court recognised the right to a healthy environment as an autonomous right protected under Article 26 of the American Convention on Human Rights (ACHR) (and Article 11 of the San Salvador Protocol). This means that the right to a healthy environment is not secondary or incidental to, nor dependant on, violations of other rights. Of course, the Court recognised that the autonomous right to a healthy environment can *also* be affected when other human rights are violated, such as the rights to life (Art 4 ACHR), to personal integrity (Art 5 ACHR), and the right not to be forcibly displaced (Art 22 ACHR), as well as several procedural rights discussed above.

Furthermore, the Court stated that the right to a healthy environment 'constitutes a universal value that is owed to both present and future generations' (AO 23/17 § 59), that it 'is a fundamental right for the existence of humankind' (ibid) and that, 'as an autonomous right, […] it protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals' (ibid, § 62).

The Court emphasised that, as a consequence, Nature and the environment must be protected not only in connection with their usefulness to human beings or due to the effects that their degradation might have on the rights of specific persons, but because of their importance to all other living organisms with whom the Planet is shared, and who merit protection in their own right. The Court also noted that, worldwide, high court judgments and the Constitutions of certain countries recognized the rights of Nature.

This means that a State could potentially violate the right to a healthy environment due to environmental degradation in itself, without harm to human persons being shown. 'In this regard, the Court note[d] a tendency, not only in court judgments, but also in Constitutions, to recognize legal personality and, consequently, rights to nature' (ibid). These aspects of *Advisory Opinion No 23* are the first steps in the Inter-American human right system toward a truly ecocentric approach (Calderón-Gamboa, Recinos).

Furthermore, in its *Advisory Opinion No 23*, the Court established and developed a number of state obligations in the face of possible environmental damage, namely, the obligation of prevention, the precautionary principle, and the obligation to cooperate — as well as procedural obligations.

Because advisory opinions form part of the Court´s jurisprudence and set out standards that are routinely applied in contentious cases, States Parties to the ACHR can be held to these obligations (Claude Reyes et al. v Chile; Sawhoyamaxa Indigenous Community v Paraguay; and Xákmok Kásek Indigenous Community v Paraguay). Indeed, in Lhaka Honhat Association (Our Land) v Argentina, in accordance with its new, direct approach, the Court recognised — for the first time in a contentious case — that the State had violated the rights to a healthy environment, to adequate food, and to water, due to the ineffectiveness of State measures to stop activities that harmed those rights (operative § 3). The Court held that illegal logging and other activities carried out in the territory of the applicants by the non-Indigenous population affected environmental rights and had an impact on Indigenous traditional ways of obtaining food and affected that population's access to water (§§ 202-230).

The Court also recognised that States' obligations to prevent the violation of environmental rights extend to the private sphere, that is, that States must prevent third parties from violating such rights and 'use all the means at their disposal to avoid activities under [their] jurisdiction[s] causing significant harm to the environment' (§ 208). When States identify activities that could potentially cause such harm, they must act in accordance with the obligation of prevention outlined above (ibid). This position is an elaboration of the standard developed in Kaliña and Lokono Peoples v Suriname which held that States can be held responsible for the activities of corporations when the former fail to implement adequate safeguards.

Regarding Principle 9 and the *Rights of Nature*, it is important to note that several jurisdictions in the Americas have explicitly recognised not just the human right to a healthy environment, but the rights of Nature itself. Nature has legal personality and rights in the constitutions of countries such as Ecuador (Constitution of Ecuador, Article 71) and Bolivia (Constitution of Bolivia, Preamble and Article 33; Law No. 71 on the Rights of Mother Earth), and in the constitutions of the Mexican federal states of Mexico City (Articles 13 and 16), Guerrero (Article 2), and Oaxaca.

The rights of Nature have also been recognised in the jurisprudence of the Constitutional Courts of Colombia (Atrato River Case and Amazon Case), Ecuador (no. 218-15-SEP-CC, 9 July 2015), Brazil, and Guatemala. There are also several recently drafted bills and local decisions recognising the rights of Nature in Argentina, Brazil, Colombia, Costa Rica, Panamá, Perú (2021 Draft bill PL 6957/2020-CR), Canada (2021 Resolutions of the Innu Council of Ekuanitshit and the Minganie Regional County Municipality (RCM) regarding Magpie River/Muteshekau Shipu), and Spain (Ley 19/22 para el reconocimiento de la personalidad juridica del Mar Menosr y su cuenca).

Therefore, the Rights of Nature perspective has been increasingly adopted around the world as a mechanism to potentially help strengthen environmental governance and contribute to implementing the 2030 Agenda for Sustainable Development. In December 2022, the 15th Conference of the Parties to the Convention on Biological

Diversity adopted the Kunming Montreal Global Biodiversity Framework, which established the importance of this ecosistemic view, noting that the "rights of nature and rights of Mother Earth" are an integral part of the framework's successful implementation, for those countries that recognize them. Moreover, IUCN Members also adopted a Resolution in 2012, at the World Conservation Congress, which tasked the Director General to initiate a strategy for dissemination, communication, and advocacy on the Rights of Nature.

At the UN level, the UN Harmony with Nature programme started in 2009 around the idea of 'promoting life in harmony with nature'. It has been working on an increasing body of resolutions, reports, annual dialogues before the UN General Assembly, and conferences around the world. It has also created a group of experts worldwide. The UN Secretary General has proposed a high-level meeting "Earth Assembly", to be held on 22 April 2024, in order to advance the non-anthropocentric paradigm and discussion on alternative holistic approaches based on diverse world views that may contribute to the implementation of the 2030 Agenda for Sustainable Development and beyond, since the success of this agenda depends on respecting the principles of Harmony with Nature.

Jorge Calderón Gamboa, October 2023